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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

No. 78-1314

RICHARD E. SPENCER,

Appellant,

vs.

LORRAINE D. SPENCER,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the North Carolina Court of Appeals is reported at 37 N.C. App., 481, _____ SE 2d _____ (1978) and is set forth in the Appendix, infra pp. 1A-12A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of N.C.G.S. § 52-12, infra, p. 2, on the ground that it is repugnant to the Constitution of the United States.

This action was commenced on April 6, 1976, by appellee seeking to recover amounts alleged to be due under a separation agreement between the parties. In his answer, appellant alleged that the agreement was void because N.C.G.S. § 52-12 unconstitutionally denied him the right to a privy exam. The trial court held that N.C.G.S. § 52-12 was not violative of either the United States Constitution or the Constitution of North Carolina and entered judgment for the appellee on May 12, 1977. On appeal, the North Carolina Court of Appeals on August 15, 1978, affirmed the trial court judgment upholding the constitutionality of the statute and vacated certain other portions of the judgment not relevant to this appeal. (Appendix, infra, p. 12A). The appellant filed Notice of Appeal and Petition for Discretionary Review to the North Carolina Supreme Court, which on November 30, 1978 denied the Petition for Discretionary Review and dismissed the appeal ex mero motu. (Appendix, infra, p. 13A). Timely Notice of Appeal to this Court was filed in the District Court Division, General Court of Justice, Guilford County, North Carolina, on the 20th day of February, 1979. (Appendix, infra, p. 14A). As the Court of Appeals of North Carolina explicitly rejected appellant's challenge to N.C.G.S. § 52-12, this matter is appropriately brought to this Court by appeal. See HUFFMAN v. PURSUE, LTD, 420 U.S. 592 (1975); NORFOLK TURNPIKE CO. v. VIRGINIA, 225 U.S. 264 (1911).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 14th Amendment to the Constitution of the United States.

This case also involves § 52-12 of the North Carolina General Statutes. At the time of the execution of the separation agreement in June of 1960, § 52-12(a) provided as follows:

> No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proven as is required for the conveyances of land; and such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to her. The certificate of the officer shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

In 1965, this section was recodified as § 52-6, which provided as follows:

(a) No contract between husband wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.

(c) Such certifying officer must be a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officer of the state, territory or foreign country where the acknowledgement and examination are made and such officer must not be a party to the contract.

(d) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract between such husband and wife.

(e) Any other provisions of this section to the contrary notwithstanding, in all cases where a married woman owning property as an individual joins with her husband in execution of a deed conveying her real property to a third party and said third party reconveys said real property to said wife and her husband as tenants by the entirety and in the deed to the third party the acknowledgment as herein provided was not complied with, but in all other respects the acknowledgment of the execution of said deed and the probate and registration thereof are regular, such conveyances shall not be void but shall be voidable only, and any action, the purpose of which is to have said conveyances set aside or declared invalid shall be commenced within seven (7) years after the recordation of such deed in the office of the register of deeds of the county or counties in which said real property is located. If no such action is or has been brought then the effect of the conveyances shall be to create an estate by the entirety.

Effective January 1, 1978 N.C.G.S. 52-6 was repealed and replaced by N.C.G.S. § 52-10, which provides:

(a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be

valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife.

QUESTION PRESENTED

Does N.C.G.S. § 52-12, which requires a privy examination of the wife as a prerequisite to the validity of any contract between the spouses, discriminate invidiously on the basis of gender in violation of the equal protection clause of the 14th Amendment?

STATEMENT

Appellant, Richard E. Spencer, and appellee, Lorraine B. Spencer, were formerly husband and wife. (R. p. 38). On June 7, 1960, they executed a purported separation agreement (R. p.14). In accordance with N.C.G.S. § 52-12(a), Lorraine Spencer was privily examined by an Assistant Clerk of Superior Court of Guilford County, North Carolina.

Pursuant to the statute, the examining officer certified that the agreement was not unreasonable or injurious to Lorraine Spencer (R. p. 15). No private examination was given to Richard Spencer in connection with the execution of the separation agreement, and there was no certification by any officer of the court that the Agreement was not unreasonable or injurious to him (R. pp. 14, 15, and 42). N.C.G.S. § 52-12 did not make provision for such an examination of the husband, nor were there any other statutory provisions requiring or permitting a private examination for male persons.

Pursuant to the agreement, Richard E. Spencer made monthly payments to Mrs. Spencer. He paid all sums due to her according to the provisions of the purported agreement until 1974 (R. p. 39). In 1974 and 1975 he paid Mrs. Spencer One Thousand One Hundred Sixteen and 92/100 Dollars ($1,116.92) per month (R. p. 38). In 1976, appellant ceased making payments to Mrs. Spencer (R. p. 39).

The appellee, Lorraine Spencer, has not remarried. Since the parties were divorced, she has obtained a Doctor of Philosophy degree in biology, and she is now gainfully employed as a professor of biology at a college in Raleigh, North Carolina. (R. p. 39).

On April 5, 1976, the appellant commenced an action for declaratory judgment in the United States District Court for the Middle District of North Carolina (R. pp. 17, 23 and 37). In that action, Richard Spencer set forth the fact that he was denied a privy examination in connection with the execution of the separation agreement in controversy. He prayed for a judgment that the separation agreement was absolutely void because he was denied the equal protection of the laws in connection with its execution. A three-judge federal court abstained from hearing the case so that the matter could first be litigated in the state courts. SPENCER v. SPENCER, et. al., 430 F. Supp. 683 (M.D.N.C. 1977). The case is now pending before the Court of Appeals for the Fourth Circuit.

The present action was commenced on April 6, 1976, the day following the commencement of the federal action. The plaintiff, Lorraine Spencer, in this action seeks to recover amounts allegedly due under the purported separation agreement.

Defendant answered, admitting plaintiff's allegation except for the contentions that he claimed unwarranted deductions. Appellant further alleged in defense that the agreement was void because N.C.G.S. § 52-12 unconstitutionally denied him the right to a privy examination (R. p. 21).

At the hearing, Mr. Spencer testified that he was represented by an attorney during the negotiations for his separation agreement in 1960. He testified that he did not get a privy examination and that when he asked his attorney for one, he was told that the privy examination was not available to a male. (R. p. 42).

On May 12, 1977, the trial court found that the Defendant was in breach of the separation agreement and ordered that he make certain payments required under the agreement. (R. pp. 45-54).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Answer, appellant alleged that the separation agreement was void because N.C.G.S. § 52-12 unconstitutionally denied him the right to a privy examination (R. p. 21).

At the close of plaintiff's evidence, the defendant, Richard E. Spencer, moved to dismiss the action pursuant to North Carolina Rules of Civil Procedure, Rule 41(b), on the stated ground that the evidence established as a matter of law that Mr. Spencer was unconstitutionally denied the protection which was afforded to his former wife in connection with the execution of the agreement and that the agreement is void and unenforceable. The court deferred ruling on the motion and the defendant excepted (R. pp. 43-44).

At the close of all of the evidence, the defendant renewed his motion for dismissal upon the grounds originally stated. The court denied the motion and the defendant excepted (R. p. 44).

In its judgment entered May 12, 1977, the court found that the plaintiff received a private examination pursuant to the statute but that the defendant did not receive a private examination (R. p. 45). The court further found that the defendant requested a private examination in connection with the execution of the separation agreement and that his attorney advised him that a male person could not have a private examination (R. 46).

The court also found that Joseph P. Shore, Clerk of Superior Court of Guilford County since 1940, has administered many private examinations, that he has never administered one to a husband or a male person, and if requested to do so, would advise the person that the law does not provide for it. (R. p. 50).

Based on the findings of fact, the court concluded as a matter of law that:

> The requirement of G.S. 52-6 [formerly N.C.G.S. § 52-12] that a wife be subjected to a private examination before a separation agreement is valid, does not deprive husbands, including the defendant, of the equal protection of the laws or any other constitutional right under the United States Constitution or the Constitution of the State of North Carolina.
>
> The undersigned, while acting as an Assistant Clerk of Superior Court of Guilford County for a number of years, conducted numerous private examinations pursuant to this statute. The Court has observed that some wives have tended to be unduly influenced by their husbands and some wives have been accustomed to leaving the financial affairs of the family entirely in the hands of their husbands and are without training

or experience in financial matters; for both of these categories of wives the statutory procedure provides a valuable safeguard for their interests. For wives who do not fall in either of these categories, the statutory procedure is not necessary, but on the other hand it does no harm. The court is of the opinion that instances of husbands being unduly influenced by wives or being deprived of familiarity with the family's financial situation, are so rare, because of the customs and traditions of our society, that extending the opportunity to husbands for being privately examined would not have any practical beneficial result. Because of defendant's degree of education, experience, and sophistication and his excellent legal representation, the court concludes that he would not have benefitted in any way from a private examination if one had been available to him. The court also concludes that defendant did not suffer any disadvantage or detriment in this case on account of plaintiff's being privately examined. (R. pp. 50-52).

The court again denied defendant's motion to dismiss and the motion for new trial (R. p. 53).

On appeal, the Court of Appeals stated defendant's contentions as follows:

> Defendant alleges that G.S. 52-6 [formerly G.S. 52-12] is violative of the equal protection clauses of the United States Constitution and the Constitution of North Carolina; that G.S. 52-6 confers a valuable right upon women; and that the separation agreeement would be void had the plaintiff not been subject to a privy exam. He concludes that the proper means by which to cure the constitutional defect of G.S. 52-6 is to treat him as if he were a woman who had been denied a privy exam and to declare the separation agreement void since he has been denied the valuable right of a privy exam. (Appendix, infra, p. 3A).

The court expressed doubt that the statute was constitutional, but declined to rule on that basis:

> In a day when women were denied education, excluded from virtually all legal and commercial matters, and sheltered in the home, we do not doubt that G.S. 52-6 could pass constitutional muster. See Butler v. Butler, supra. We are equally convinced, however, that the statute cannot do so any longer. See Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed. 2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). Whether the statute would be justifiable in a 1960 factual setting, the setting in which this case arises, is less clear. However, we do not believe that it is necessary to decide that question at this time.

(Appendix, infra, p. 8A).

The court held, however, that the defendant was without standing to raise the issue of constitutionality:

> Our courts, both state and federal, have long held that they were prohibited from issuing advisory opinions to private litigants and that, therefore, litigants who do not have a personal and concrete stake in the outcome of a case do not have standing to litigate. See Linda R.S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973); Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E. 2d 333 (1955). Defendant has urged this Court to hold G.S. 52-6 unconstitutional. If we were to do so, the result would be to eliminate the privy examination altogether; not to require married males also to undergo a privy exam. Such a holding would have absolutely no effect on defendant. He does not have a personal and concrete stake in this issue since its resolution in favor of invalidity would not affect his interest in the case. Defendant, therefore, has no standing to raise the issue of the constitutionality of G.S. 52-6 in this Court.

> We reiterate our holding on this issue for the sake of clarity. We hold only that plaintiff has no standing to raise the issue of the constitutionality of G.S. 52-6. Our discussion of its constitutionality serves only to clarify our holding that defendant lacks standing to raise the issue.

(Appendix, infra, p. 10A.)

From the Judgment of the Court of Appeals, the appellant timely appealed to the North Carolina Supreme Court and, in the alternative, petitioned for discretionary review. The North Carolina Supreme Court denied the petition for discretionary review and dismissed the appeal ex mero motu (Appendix, infra, p. 13A).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. N.C.G.S. § 52-12 discriminates invidiously on the basis of gender in violation of the Fourteenth Amendment.

Under N.C.G.S. § 52-12, a privy examination of the wife is a prerequisite to the validity of any contract between spouses. DAVIS v. DAVIS, 269 N.C. 120, 152 S.E. 2d 306 (1967); BOLIN v. BOLIN, 246 N.C. 666, 99 S.E. 2d 920 (1957). Whenever spouses contract with each other, a certifying officer is required to examine the wife, separate and apart from her husband. Based upon this examination, the officer must certify that the wife signed the contract freely and voluntarily, without fear or compulsion of her husband or any other person. He must also find as a fact and certify that the contract is not unreasonable or injurious to her. Unless these requirements are met, the contract is absolutely void. DAVIS v. DAVIS, supra; CALDWELL v. BLOUNT, 193 N.C. 560, 563, 137 S.E. 578 (1927); BUTLER v. BUTLER, 169 N.C. 584, 86 S.E. 507 (1915).

By the terms of the statute, the privy examination requirement applies only to "wives" and does not apply to "husbands." The statute neither requires nor permits a privy examination for male persons under any circumstances. N.C.G.S. § 52-12; KANOY v. KANOY, 17 N.C. App. 344, 194 S.E. 2d 201 (1973).

The statute classifies married persons based on their gender alone. A married female person always comes within the provisions of the statute, regardless of her intelligence, education and general competency. A married male person, however, never comes within the provisions of the statute and is not entitled to a privy examination under any circumstances. KANOY v. KANOY, supra. The applicability of the statute, therefore, depends solely upon the gender of the persons involved.

This classification on the basis of gender violates the equal protection clause of the Fourteenth Amendment. Although a state may treat different classes of persons in different ways, it may not place persons into different classes on the basis of criteria which are unrelated to the purpose of the legislation. The basic rule in the area of equal protection is set forth in ROYSTER GUANO CO. v. VIRGINIA, 253 U.S. 412 (1920):

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. 253 U.S. at 415.

As shown in cases discussed below, however, the test is much more stringent where the classification is inherently suspect. In such cases, the state must show a "compelling state interest" for the classification.

In FRONTIERO v. RICHARDSON, 411 U.S. 677 (1973), four members of the court agreed that classifications on the basis of sex are "inherently suspect" and must be subjected to close judicial scrutiny. Justice Stewart found the discrimination in that case to be "invidious." The Chief Justice and Justices Powell and Blackmun concluded that the statute involved in that case was unconstitutional no matter what level of review was required. They concluded, therefore, that it was unnecessary to decide whether

classifications on the basis of gender were inherently suspect.

The heavy burden of proving a compelling state interest in the face of the suspect criterion is illustrated in several recent cases. Any analysis of gender discrimination cases must begin with REED v. REED, 404 U.S. 71 (1971). In that case, a mother filed a petition seeking appointment as administratrix of the estate of her minor son. The child's father filed a competing petition seeking to have himself appointed administrator. Under the Idaho Probate Code, the parents of a decedent were in the same entitlement class for appointment as administrator. The Probate Court, without attempting to determine the relative capabilities of the applicants, issued letters of administration to the father. This was done on the basis of a provision of the Probate Code that males must be preferred to females where persons of equal entitlement sought to administer an estate. The Court held that this provision violated the equal protection clause. Said the Court:

> . . . [t]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citation omitted.) The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of (the statute in question). 404 U.S. at 75-76.

In determining the objective sought to be attained by the statute, the court accepted the conclusion of the Idaho Supreme Court that the statute was designed to eliminate one area of controversy when two or more persons sought letters of administration. However, the court held that the distinction drawn by the statute was arbitrary and not reasonably related to this objective.

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether §15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. 404 U.S. at 76-77.

Thus, the court held invalid a legislative classification which distinguished between persons solely on the basis of sex.

In STANLEY v. ILLINOIS, 405 U.S. 645 (1972), the Supreme Court held unconstitutional an Illinois statute which provided that children of an unmarried father, upon the death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect. The court concluded that the presumption implicit in Illinois law that unmarried fathers are unsuitable and neglectful parents is violative of due process (405 U.S. at 649) and that all Illinois parents, both married and unmarried, male or female, are constitutionally entitled to a hearing on their fitness before their children are removed from their custody (405 U.S. at 658).

A similar classification was struck down by the Court in FRONTIERO. In that case, federal statutes permitted a serviceman to claim his wife as a "dependent" and receive a dependency allowance for her. A serviceman received this allowance whether or not his wife was in fact dependent upon him for any part of her support. A servicewoman, on the other hand, could claim her husband as a "dependent" only if he was in fact dependent upon her for over one-half of his support. Ms. Frontiero, a servicewoman, challenged the validity of the statute. The Supreme Court held the legislative classification invalid. Mr. Justice Brennan, in the plurality opinion, wrote for the court:

> At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and indeed, find at least implicit support for such an approach in our unanimous decision only last Term in REED v. REED 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971). 411 U.S. at 682.

Furthermore, Justice Brennan observed that discrimination on the basis of gender violates the basic concept of our legal system:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' WEBER v. AETNA CASUALTY & SURETY CO. 406 U.S. 164, 175, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972). And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the

> recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. at 686-687.

For these reasons, the plurality concluded that classifications based upon gender are inherently suspect and must be subjected to strict judicial scrutiny. Applying this standard, the plurality concluded that the classification between servicemen and servicewomen was not reasonably related to a legitimate government objective.

Another classification on the basis of gender was held invalid in WEINBERGER v. WIESENFELD, 420 U.S. 636 (1975). That case involved a provision of the Social Security Act which granted benefits based on the earnings of a deceased husband and father to his widow and to the minor children in her care. However, benefits based on the earnings of a deceased wife and mother were payable only to the minor children and not to the widower. Said the Court:

> The gender-based distinction made by § 402(g) is indistinguishable from that invalidated in FRONTIERO (Citation omitted). 420 U.S. at 642-643.
>
> . . . (T)he framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.' (citations omitted)
>
> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses is not entirely without empirical support. (Citation omitted.) But such a gender-based generalization cannot suffice to justify the denigration of the efforts of

> women who do work and whose earnings contribute significantly to their families' support.
>
> Section 402(g) clearly operates, as did the statutes invalidated by our judgment in FRONTIERO, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman under the statutes invalidated in FRONTIERO to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support. . . . 420 U.S. at 644-645.

The WIESENFELD case is remarkably similar to the case at bar. In both cases, the classifications are even more "pernicious" than the classification in FRONTIERO. In FRONTIERO, at least, a servicewoman did have an opportunity to prove that her husband was in fact dependent upon her for his support. In WIESENFELD, the male plaintiff could not under any circumstances qualify for benefits based upon his wife's earnings. In the present case, defendant cannot under any circumstances qualify for a privy examination. The discrimination here is blatant and unyielding.

As in the cases discussed above, the classification on the basis of gender contained in N.C.G.S. Sec. 52-12 has no fair and substantial relation to a legitimate objective of the legislation. The lack of any such reasonable basis for the classification becomes clear when the purpose of the statute is considered. The object of N.C.G.S. Sec. 52-12, as stated by the North Carolina Supreme Court, is "to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation." SIMS v. RAY, 96 N.C. 87, 89, 2 S.E. 443 (1887). In KEARNEY v. VANN, 154 N.C. 311, 70 S.E. 747 (1911), the court explained the rationale behind the statute:

> The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify. . . . 154 N.C. at 319, 70 S.E. .

The legislature has assumed, therefore, that wives are subject to the coercion of their husbands, but husbands are not subject to the coercion of their wives. It has assumed that all women need protection when contracting with their husbands, but no man ever needs protection when contracting with his wife. The presumption is irrebuttable, so that a male person can never, under any circumstances, qualify for a privy examination. Such irrebuttable presumptions are disfavored under the Fourteenth Amendment.

In CLEVELAND BOARD OF EDUCATION v. LAFLEUR, 414 U.S. 632, (1974), the court considered an irrebuttable presumption that a teacher is physically unable to continue her work after a certain month of pregnancy. The court rejected this presumption, saying:

> The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapcitated pregnant teachers. But the question is whether the rules sweep too broadly. (Citation omitted.) That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor--or the school board's--as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

As the Court noted last Term in VLANDIS v. KLINE, 412 U.S. 441, 446, 37 L. Ed. 2d 63, 93 S. Ct. 2230, 'permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.' 414 U.S. at 644.

See also, STANTON v. STANTON, 421 U.S. 7 (1975), in which the court overturned a Utah statute which provided that a female child reached her majority upon attaining the age of 18 years, but that a male child did not reach majority until he attained the age of 21 years. The Court held that, notwithstanding the "old notions" of the roles of males and females upon which it was based, the statute discriminated between male and female children in violation of the Fourteenth Amendment. 421 U.S. at 14-15.

Thus, the court has rejected old assumptions that the capabilities and needs of a person are determined by his or her sex. Likewise, the court should reject the old assumptions underlying N.C.G.S. § 52-12. The extent to which a person is susceptible to coercion by his or her spouse obviously will depend upon the mental and emotional capabilities of the individual and the circumstances of the particular case. Clearly the legislature might conclude that a person contracting with his spouse, particularly in the context of a separation agreement, may be under emotional stress and may require the protection afforded by an independent examination of the contract by an officer of the court. However, the legislature may not validly conclude that male persons, simply because they are male, do not require this protection.

In the present case, the statutory distinction is based solely upon gender and has no relation to the actual needs or capabilities of the persons involved. The actual purpose of the statute is to afford protection to persons who might be coerced or unduly influenced when contracting with their spouses. It cannot be denied that there are men as well as women who need such protection.

It may be assumed, for purposes of argument, that women are statistically more likely to be subjected to coercion by their spouses than are men. Such a statistical basis for classification has been rejected by the Court where "suspect criteria" are involved. CRAIG v. BOREN, 429 U.S. 190 (1976); STANLEY v. ILLINOIS, 405 U.S. 645 (1972).

In the present case, the legislature has assumed that men are never susceptible to influence or coercion by their wives. Based upon this assumption, the legislature has denied male persons the protection afforded by N.C.G.S. Sec. 52-12. In doing so, the state has relegated the entire class of male persons to "inferior legal status without regard for the actual capabilities" of the members of the class. FRONTIERO, 411 U.S. at 687. The state has made the very kind of arbitrary distinction which is forbidden by the Fourteenth Amendment. The distinction on the basis of gender does not bear a reasonable relation to the stated objective of protecting persons who might be coerced or unduly influenced when contracting with their spouses.

The courts have mentioned a second objective of N.C.G.S. Sec. 52-12--to validate transactions by married women which were void at common law. In KANOY v. KANOY, 17 N.C. App. 344, 194 S.E. 2d 201 (1973), the court explained:

> The statute (G.S. 52-6) was designed to validate transactions void at common law and to prevent fraud. (Citations omitted.) This Court in TRAMMELL v. TRAMMELL, supra, quoted the following from CALDWELL v. BLOUNT, supra:
>
> 'C.S. 2515 (now G.S. 52-6) is an enabling statute; but for the statute the deed of a wife conveying land to her husband would be void. Such deed is valid only when the statute has been strictly complied with. 17 N.C. App. at 346-347, 194 S.E. 2d at ____.

This purpose could have been accomplished by statute without the discriminatory provision for private examinations. Indeed, this objective could be met even if the privy examination provisions were entirely deleted from the statute. The gender-based discrimination cannot, therefore, be justified by reference to a state objective which is in no way advanced by that discrimination.

(On January 1, 1978, N.C.G.S. §52-6 (formerly G.S. §52-12) was repealed and was replaced by the new sex-neutral N.C.G.S. §52-10, under which no privy examination is required. This action suggests that the state legislature recognized that the old notions of the roles of men and women were no longer valid and that the statute was constitutionally defective. The repeal of the privy examination requirement, however, does not remedy the past discrimination.)

In summary, neither of the two stated purposes of N.C.G.S. §52-12 will suffice to justify the invidious discrimination contained therein. The distinction drawn by the statute, like the distinction in FRONTIERO, is based solely on the gender of the individuals involved and has no "fair and substantial relation" to the legitimate government objective.

Plaintiff may argue that N.C.G.S. §52-12 discriminates between men and women in order to rectify the effects of past discrimination against women. This argument, however, has little to recommend it. The statute hardly bolsters the position of women by presuming that they can act intelligently only under the supervision of a certifying officer, and by further presuming that all men are above the need of such supervision. As in WEINBERGER, the purpose of this statute is "in no way premised upon any special disadvantages of women." It is premised rather upon a presumed inherent mental and emotional disability. As in STANTON, this presumption "coincides with the role-typing society has long imposed."

Furthermore, there is, in this case, neither legislative history nor case law to support an assertion that the legislature intended, by limiting the privy examination to women, to compensate women for past discrimination. The North Carolina Supreme Court has repeatedly explained the purpose of the statute, and that court has never asserted or even hinted that the purpose was to compensate women for the effects of past discrimination. This court has demonstrated that it will not exercise its imagination to conceive of justifications which could save an otherwise invalid statutory classification. See, e.g., JAMES v. STRANGE, 407 U.S. 128 (1972); WEBER v. AETNA CASUALTY & SURETY CO., 406 U.S. 164 (1972).

This case should be distinguished from other cases involving statutes which attempt to compensate women for economic disadvantages suffered in the past. See, e.g., CALIFANO v. WEBSTER, 430 U.S. 313 (1977); SCHLESINGER v. BALLARD, 419 U.S. 498 (1975). The case at bar involves no monetary payments to members of either sex. This is not a case where the state conferred a tax benefit or other monetary benefit upon an economically disadvantaged minority. It is simply a case where the state denies male persons the protection of an independent review by an officer of the court of any contract they make with their spouses. By denying this protection to male persons, the state in no way rectifies the effects of past discrimination against female persons. At best, the state merely permits some female persons to gain an advantage over their spouses by means of contracts which are unfair and unreasonable and which would not be certified by an officer of the court if the opportunity for review were available. No inequities would be perpetuated by affording male persons the opportunity for privy examinations. The effect would be only to prevent overreaching and duress by a spouse of either sex.

In short, there are no objectives of N.C.G.S. §52-12, real or imagined, which will suffice to validate the discrimination contained therein. The

statute deprives male persons of a privilege guaranteed to female persons. This invidious discrimination is forbidden by the Fourteenth Amendment to the United States Constitution.

II. Appellant has standing to raise the issue of constitutionality of N.C.G.S. §52-12.

The Court of Appeals of North Carolina did not reach the constitutionality of the statute, although it intimated that if the question were properly presented it would be unconstitutional. The court based its holding on its conclusion that defendant did not having standing to raise the constitutional question:

> Defendant has urged this Court to hold G.S. 52-6 unconstitutional. If we were to do so, the result would be to eliminate the privy examination altogether; not to require married males also to undergo a privy exam. Such a holding would have absolutely no effect on defendant. He does not have a personal and concrete stake in this issue since its resolution in favor of invalidity would not affect his interest in the case. Defendant, therefore, has no standing to raise the issue of constitutionality of G.S. §52-6 in this Court.
>
> We reiterate our holding on this issue for the sake of clarity. We hold only that plaintiff (sic) has no standing to raise the issue of the constitutionality of G.S. 52-6. Our discussion of its constitutionality serves only to clarify our holding that defendant lacks standing to raise the issue.

(Appendix, infra, p. 10A).

Whether the appellant has standing to attack the state statute in this court depends upon "whether the appellant 'has sustained or is immediately in danger of sustaining some direct injury as the result of

[the statute's] enforcement . . . .' COMMONWEALTH OF MASSACHUSETTS v. MELLON, 262 U.S. 447, 488, 43 S. Ct. 597, 601 67 L. Ed. 1078." CRAMP v. BOARD OF PUBLIC INSTRUCTION, 368 U.S. 278, 283 (1961). In his Answer, defendant-appellant asked for a declaration that the statute was unconstitutional in that it did not afford a husband the opportunity for a privy examination which was available to the wife; that in order to meet the constitutional mandate, such an examination must be available to the husband and, in the absence of a privy examination, the separation agreement was void. The harm to the defendant is apparent in that he was not afforded the separate judicial review to determine the fairness of the agreement. Enforcement of the agreement will cause substantial and direct harm to the defendant. The presumption of the statute that the wife is coerced by the husband (and implicitly that the husband is free from such coercion by the wife) (KEARNEY v. VANN, 154 N.C. 311, 70 S.E. 747 (1911)) denies to the husband the valuable right to receive a judicial examination of the reasonableness of the contract. See, e.g., STANLEY v. ILLINOIS, 405 U.S. 645 (1972).

Conclusion

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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Certificate of Service

I, Bruce H. Connors, one of the attorneys for Richard E. Spencer, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of February, 1979, I served copies of the foregoing Jurisdictional Statement and its Appendix on Lorraine B. Spencer, Plaintiff by mailing a copy to Mr. Norman D. Smith, Attorney for Plaintiff-Appellee, Smith, Patterson, Follin, Curtis, James & Harkavy, 704 Southeastern Building, Greensboro, North Carolina 27401, first-class mail, postage prepaid.

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APPENDIX

LORRAINE B. SPENCER v. RICHARD E. SPENCER

No. 7718DC823

(Filed 15 August 1978)

APPEAL by defendant from Yeattes, Judge. Judgment entered 12 May 1977, District Court, Guilford County. Heard in the Court of Appeals 28 June 1978.

Plaintiff and defendant formerly were husband and wife. They entered into a separation agreement 7 June 1960. The agreement provided inter alia that plaintiff wife would each year after 1 January 1972, in equal monthly installments, 25 percent of defendant's income for the preceding year for her maintenance and support. "Income" was defined as adjusted gross income as shown on his federal income tax return plus any capital gains deductions and any "tax-free" income. The expenses of the defendant deductible in arriving at adjusted gross income were to be "subject to reasonable additional scrutiny . . . so that the Wife shall not be subjected to unwarranted adjustments. . . ." An absolute divorce was granted in 1961.

Payments continued until 1976 when the defendant ceased making payments. Also, plaintiff contends, insofar as this appeal is concerned, that the 1975 payments were deficient in that defendant claimed an unwarranted deduction. Plaintiff sought a similar adjustment to the 1976 reported adjusted gross income for certain of that year's deductions. Plaintiff alleged, and offered evidence tending to prove, that she was entitled to the payments.

Defendant answered admitting plaintiff's allegations except for the contentions that he claimed unwarranted deductions. As a defense, defendant alleged that the agreement was void because G.S. 52-6, with which the

parties had complied, unconstitutionally denied him the right to a privy exam.

At trial, the only genuine dispute as to unwarranted deductions was over deductions claimed for a beach cottage owned by defendant and his present wife. Defendant asserted that he held the cottage as rental property. He testified that he advertised the property for rent and rented it some. He also used the property personally one to three weeks a year. The cottage remained unoccupied some of the time. Defendant's tax returns for 1974 and 1975 reflected a loss on this property.

The trial court held that G.S. 52-6 was not violative of either the United States Constitution or the Constitution of North Carolina. The court further held that, as to the beach cottage, "it cannot be concluded that the acquisition and maintenance of this property was an activity engaged in for profit. . . ." The court held that defendant could deduct only the cost of taxes and interest on the cottage. This holding was expressly pursuant to 26 U.S.C. § 183 which provides, in pertinent part:

> In the case of an activity not engaged in for profit . . . , there shall be allowed--
>
> > (1) the deductions which would be allowable under this chapter for the taxable year without regard to whether or not such activity is engaged in for profit, and
> >
> > (2) a deduction equal to the amount of deductions which would be allowable under this chapter for the taxable year only if such activity were engaged in for profit, but only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions allowable by reason of paragraph (1).

The court entered judgment for plaintiff for 25 percent of the unwarranted deduction claimed on the 1974 return

(the amount by which the 1975 payments were affected); for the full amount of 1976 payments including the adjustment for the unwarranted deduction; and for the full amount for the first three months of 1977.

From that judgment, defendant appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff appellee.

Janet L. Covey for defendant appellant.

MORRIS, Judge.

We will address first the constitutional issues raised by defendant's appeal. Defendant alleges that G.S. 52-6 is violative of the equal protection clauses of the United States Constitution and the Constitution of North Carolina; that G.S. 52-6 confers a valuable right upon women; and that the separation agreement would be void had the plaintiff not been subject to a privy exam. He concludes that the proper means by which to cure the constitutional defect of G.S. 52-6 is to treat him as if he were a woman who had been denied a privy exam and to declare the separation agreement void since he has been denied the valuable right of a privy exam. Plaintiff summarily dismisses defendant's argument. She contends that this case is controlled by Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915). We do not feel that defendant's arguments should be so lightly dismissed; nor do we believe that the present case is necessarily controlled by Butler v. Butler, supra.

In addressing defendant's argument, we must first examine the history behind G.S. 52-6. At common law, the fiction of the unity of husband and wife rendered all deeds of separation void. Our Court was especially troubled by the possibility of a separation agreement.

> The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism.

It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics--its oneness--'they shall be no longer twain but one flesh,' 'to live together after God's holy ordinance,' 'so long as they both shall live.' . . . It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven, their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but together--the nursery of morality and piety, and the bulwarks of society.

How different from this is marriage, quarrel, separation!--the anomalous condition of a husband without a wife, a wife without a husband, parents without children, and children without parents! Such relations too surely follow deeds of separation. . . .

* * *

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties towards a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.

* * *

We do not, however, put the case upon the ground of fraud or imposition on the part

of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court. Collins v. Collins, 62 N.C. 153, 155-159 (1867).

Though the Court had earlier raised questions concerning the continuing validity of Collins v. Collins, supra, in such cases as Sparks v. Sparks, 94 N.C. 527 (1886), it was not until 1912 that the Court expressly upheld the validity of a separation agreement. In Archbell v. Archbell, 158 N.C. 408, 74 S.E. 327 (1912), the Court held that

> In Collins v. Collins, 62 N.C., 153, the Court made definite decision 'that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy and therefore void.' Since that decision was rendered in 1867, our statutes upon 'Marriage and Marriage Settlements and Contracts of Married Women' as entitled in The Code of 1883 and contained with amendments in Revisal 1905, ch. 51, have made such distinct recognition of deeds of this character, more especially in Revisal, secs. 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law. This change in our public policy, which has been not inaptly termed and held synonymous with the 'manifested will of the State,' Jacoway v. Benton, 25 Arkansas, 634, has been already recognized in several of our decisions, as in Ellett v. Ellett, 157 N.C., 161; Smith v. King, 107 N.C., 273; Sparks v. Sparks, 94 N.C., 527. . . . 158 N.C. at 413, 74 S.E. at 329.

Revisal 1905, chapter 51, section 2107, the statute which governed Archbell v. Archbell, supra, provided that contracts between a husband and wife would be effective to transfer any interest in real estate, including the income interest, for longer than three years, only if the wife were privately examined. (Its wording closely parallels the language of G.S. 52-6.) Section 2108 of chapter 51 of the Revisal of 1905 validated contracts executed in conformity with section 2107, and section 2116 of that same chapter conferred "free trader" status upon a woman separated under a deed of separation. These provisions parallel the earlier provisions of sections 1831, 1835, and 1836 of chapter 42 of the Code of 1883.

One can see that the forerunner of G.S. 52-6 was viewed as an act increasing the rights of women. In Sims v. Ray, 96 N.C. 87 (1887), the Court in discussing a deed from the wife to her husband, held as follows:

> [W]e take it as settled, that prior to the act of 1871-'2, incorporated in The Code, Secs. 1835, 1836, the wife could not by deed convey to her husband, the doctrine being, as laid down in Malone on Real Property, 600, that 'unless the wife convey under power to dispose of the same, her disabilities are a bar and on her death the land descends to her heirs,' and except as authorized by Secs. 1835 and 1836 of The Code, this is still the law. . . . 96 N.C. at 89.

At the time of its enactment, and at the time our Supreme Court examined its constitutionality, the statute requiring a privy exam conferred a right upon women which they had previously been denied--the right to enter into separation agreements. Thus, even though the examination requirement may have restricted the exercise of that right, the courts focused upon the new right conferred by the statute.

The case which expressly addressed the issue of constitutionality,[1] Butler v. Butler, supra, only made the general statement that the statute was constitutional and then cited three cases which did not discuss the constitutionality of the statute. Also, we note that no question as to the statute's constitutionality was raised at trial in Butler v. Butler, supra; nor was the question discussed in the parties' briefs. Furthermore, since the decision in Butler v. Butler, supra, the United States Supreme Court has radically altered its position on the constitutionality of classifications based upon gender. Compare In re Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929 (1894), where the Court held that women could be constitutionally denied admission to the bar solely on the basis of sex, with Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed. 2d 514 (1975), where the Court held a gender based classification of the Social Security Act unconstitutional even though, when enacted, it was intended to be benevolent toward women and even though it was based upon an empirically demonstrable difference.

The Constitution must be applied in the light of the facts of the case before the court. The great

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1. Since the decision in Butler v. Butler, supra, the citizens of this State have twice voted to amend the State Constitution in order more specifically to provide for equality under the law, and, on one of those occasions, they specifically voted in favor of equality between the sexes. See Constitution of North Carolina, Art. I, sec. 19 (1970 Amendment), and Art. X, sec. 4 (1964 Amendment). The courts of this State have never ruled upon the constitutionality of the statute in light of the equal protection clause of Article I, Sec. 19 of the Constitution of North Carolina. It would appear, therefore, that the holding of the Supreme Court in Butler v. Butler, supra, would not be controlling in a decision as to whether G.S. 52-6, now repealed, was in violation of the Constitution of North Carolina when applied to a case arising after 1970.

principles underlying our system of government cannot be sacrificed, but neither can a court ignore reality. We should feel no need to apologize when the great tides of human events demand that we reappraise and reapply our Constitution in the light of changed facts. The role of women in our society has changed drastically since 1915. At the time Butler v. Butler, supra, was deciced, women could not vote. Today, two women are members of the Cabinet of the President of the United States; a woman is chairman of the majority political party of this State; and two women serve as members of the Cabinet of the Governor of this State. At the turn of the century, women could be denied admission to the bar on the basis of gender. Today the Chief Justice of North Carolina is a woman, as is the Chief Justice of the Supreme Court of the most populous state in the Union. At the turn of the century, women rarely left the home unescorted. Under the previous administration, a woman served as the United States Ambassador to our closest ally, Great Britain. This changing role of women must be considered by courts as part of the facts of the case before it. Because of the rapid rate of change there would be genuine distinctions in cases arising in 1915, 1960, and 1978.

In a day when women were denied education, excluded from virtually all legal and commercial matters, and sheltered in the home, we do not doubt that G.S. 52-6 could pass constitutional muster. See Butler v. Butler, supra. We are equally convinced, however, that the statute cannot do so any longer. See Weinberger v. Wisenfeld, supra; Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed. 2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). Whether the statute would be justifiable in a 1960 factual setting, the setting in which this case arises, is less clear. However, we do not believe that it is necessary to decide that question at this time.

If G.S. 52-6 is unconstitutional, as defendant has argued and as we believe the holding of this Court would

be were the question presented,[2] what would be the appropriate remedy? Defendant contends that the right to privy exam is a valuable right and that we should, therefore, extend that right to him. We disagree. When first enacted, G.S. 52-6 (or, rather, its forerunner) conferred a right--the right to enter into a separation agreement. See Archbell v. Archbell, supra. The question is whether the requirement that women have a privy exam prior to entering a separation agreement is a permissible restriction. While in 1915 it was a permissible restriction, the privy exam itself is now and always has been a restriction on the exercise of a right--not a right in itself. This Court has previously held that freedom of contract is a valuable right. See North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General, 17 N.C. App. 701, 195 S.E. 2d 357 (1973). We do not believe that infringing upon the freedom of contract enjoyed by married males would be the proper means to remedy the alleged invidious discrimination of G.S. 52-6. The proper remedy, indeed, the only remedy, would be to strike the privy exam requirement from G.S. 52-6.

If at some future time the question of the constitutionality of G.S. 52-6 is properly raised, and if it is found unconstitutional, the natural and logical result would certainly be the elimination of the privy exam requirement. A woman in the defendant's situation would no longer be allowed to defend on the basis that the separation agreement was void.

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2. We note that G.S. 52-6 has been repealed effective 1 January 1978. The statute has been replaced by a new sex-neutral statute, G.S. 52-10. Also, over the years, the legislature has tried to limit the damage of G.S. 52-6 by passing curative statutes such as G.S. 52-8 as it stood at the time this suit was initiated. However, like Br'er Rabbit and the Tar Baby, the legislature found itself unable to turn the wretched creature loose. See Boone v. Brown, 11 N.C. App. 355, 181 S.E. 2d 157 (1971).

Our courts, both state and federal, have long held that they were prohibited from issuing advisory opinions to private litigants and that, therefore, litigants who do not have a personal and concrete stake in the outcome of a case do not have standing to litigate. See Linda R.S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973); Lutz Industries, Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E. 2d 333 (1955). Defendant has urged this Court to hold G.S. 52-6 unconstitutional. If we were to do so, the result would be to eliminate the privy examination altogether; not to require married males also to undergo a privy exam. Such a holding would have absolutely no effect on defendant. He does not have a personal and concrete stake in this issue since its resolution in favor of invalidity would not affect his interest in the case. Defendant, therefore, has no standing to raise the issue of the constitutionality of G.S. 52-6 in this Court.

We reiterate our holding on this issue for the sake of clarity. We hold only that defendant has no standing to raise the issue of the constitutionality of G.S. 52-6. Our discussion of its constitutionality serves only to clarify our holding that defendant lacks standing to raise the issue.

Additionally, on the question of defendant's standing to attack the validity of the requirement of a privy examination of the wife, it is to be noted that the court concluded that "because of defendant's degree of education, experience, and sophistication and his excellent legal representation, the court concludes that he would not have benefited in any way from a private examination if one had been available to him." The court also concluded "that defendant did not suffer any disadvantage or detriment in this case on account of plaintiff's being privately examined." To the latter conclusion, defendant did not except. Although he did except to the former, he did not bring it forward and argue it in his brief. It appears from the record that the conclusions are supported by the findings of fact and the findings of fact are amply supported by the evidence. Even if the questions of constitutionality

were properly before us and we should uphold the validity of the statute made applicable to both sexes, defendant could show no injury.

The second issue raised by this appeal is whether the trial court erred in disallowing, for the purpose of maintenance and support payments, adjustments to gross income due to losses on the rental of defendant's beach cottage. The trial court found that the cottage was advertised for rent; that defendant and his wife occupied the cottage three or four weeks a year; and that it remained unoccupied for a considerable period of time. The court concluded that "it cannot be concluded that the acquisition and maintenance of this rental property was an activity engaged in for profit. . . ." The court figures deductions in accordance with 26 U.S.C. § 183 and ordered increased payments.

While these findings might support the conclusion if, as in normal tax cases, the taxpayer had the burden of proof, the findings for the purposes of this case do not support the conclusion. First of all, we note that here plaintiff, not defendant (the taxpayer), has the burden of proof. Defendant has claimed deductions under 26 U.S.C. § 212 as "ordinary and necessary expenses paid or incurred . . . for the management, conservation, or maintenance of property held for the production of income. . . ." Apparently, the Internal Revenue Service has allowed the deductions. In order to prove her entitlement to an increased payment, plaintiff must show that the property was not held for the production of income.

If the trial court had found that the primary purpose in the ownership of the cottage was recreation, and there is evidence to support such a finding, it could have properly concluded that the activity was not engaged in for a profit. The findings as they are, however, do not support the conclusion that "it cannot be concluded that . . . this . . . was an activity engaged in for a profit. . . ." The simple findings of part-time personal use and periods of vacancy do not support the conclusion that defendant is entitled to

deductions only under 26 U.S.C. § 183. That portion of the judgment dealing with the increase in payments must, therefore, be vacated, and the case remanded to the trial court for further findings in this regard.

Counsel for the parties have furnished us with very well-written briefs evidencing exhaustive research. We are appreciative of their efforts. We feel compelled, however, to point out to defendant's able counsel that the efficacy of an otherwise excellent brief is greatly diminished by reason of failure to refer to either exceptions or assignments of error. This is a glaring violation of Rule 28(b)(3), North Carolina Rules of Appellate Procedure, and, but for the gravity of the question raised, would require dismissal of the appeal.

The judgment of the trial court in denying defendant's motions to dismiss and in holding defendant liable under the separation agreement is affirmed for the reasons set out previously. The judgment of the trial court, insofar as it reflects an increase in the payments due as a result of disallowing certain deductions related to the rental of the beach cottage, is vacated, and the case is remanded for further findings of fact.

Affirmed in part; vacated in part; and remanded.

Judges HEDRICK and WEBB concur.

No. 51PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1978

****

LORRAINE B. SPENCER	)	
	)	JUDGMENT DISMISSING
v.	)	APPEAL EX MERO MOTU
	)	AND DENYING PETITION
RICHARD E. SPENCER	)	FOR DISCRETIONARY REVIEW
	)	(7718DC823)

****

This matter came on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30, and petition for discretionary review pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in Conference, this 28th day of November, 1978, that the petition for discretionary review be denied, that the appeal be dismissed ex mero motu, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the Defendant do pay the sum of Nine and no/100 Dollars ($9.00) and execution issue therefor.

s/ Britt, J.
For the Court

The foregoing order is issued overy my hand and the seal of the Supreme Court this 30 day of November, 1978.

s/_____
John R. Morgan
Clerk of the Supreme Court of
North Carolina

NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
76 CvD 3128

LORRAINE B. SPENCER,
Plaintiff-Appellee,

vs.

RICHARD E. SPENCER,

Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (filed 20 February 1979)

Notice is hereby given that RICHARD E. SPENCER, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the North Carolina Court of Appeals rendered August 15, 1978 insofar as said decision affirmed the judgment of the trial court.

This appeal is taken pursuant to 28 USC § 1257(2).

/s/ Walter L. Hannah
Walter L. Hannah

/s/ Bruce H. Connors
Bruce H. Connors

Attorneys for Richard E. Spencer,
Appellant

OF COUNSEL:

Adams, Kleemeier, Hagan, Hannah & Fouts
Suite 600 Jefferson Standard Building
Post Office Box 3463
Greensboro, North Carolina 27402
(919) 373-1600

CERTIFICATE OF SERVICE

I, Bruce H. Connors, one of the attorneys for Richard E. Spencer, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of February, 1979, I served copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on Lorraine B. Spencer, Plaintiff by mailing a copy to Mr. Norman D. Smith, Attorney for Plaintiff-Appellee, Smith, Patterson, Follin, Curtis, James & Harkavy, 704 Southeastern Building, Greensboro, North Carolina 27401, first-class mail, postage prepaid.

/s/ Bruce H. Connors
Bruce H. Connors

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Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1314

RICHARD E. SPENCER,

Appellant,

vs.

LORRAINE B. SPENCER,

Respondent.

ON APPEAL FROM THE NORTH CAROLINA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM JUDGMENT

Norman B. Smith
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Greensboro, N. C. 27401

Counsel for Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1314

RICHARD E. SPENCER,

Appellant,

vs.

LORRAINE B. SPENCER,

Respondent.

ON APPEAL FROM THE NORTH CAROLINA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM JUDGMENT

Pursuant to Rule 16(1)(c) of the rules of this Court, appellee moves the Court to affirm the judgment of the North Carolina Court of Appeals, on the ground that it is manifest that the question on which this cause depends is so insubstantial as not to need further argument.

In the alternative, pursuant to Rule 16 (1)(d) of the rules of this Court, appellee moves the Court to dismiss the appeal from the judgment of the North Carolina Court of Appeals, on the ground that the appellant is without standing to maintain the appeal.

STATEMENT

The appellant, Richard E. Spencer, and the appellee, Lorraine B. Spencer, were formerly husband and wife. On June 7, 1960, the parties entered into a separation agreement by the terms of which appellant agreed to make periodic alimony payments to appellee. (R.p. 45)

Pursuant to N.C.G.S. §52-6 (then N.C.G.S. §56-12), appellee received a private examination by an assistant clerk of superior court of Guilford County to approve her execution of the separation agreement. Appellant's execution of the agreement was notarized, but he did not receive a private examination. (R.p. 45)

During the negotiations which resulted in the separation agreement, both appellant and appellee were represented by counsel who were highly regarded members of the Greensboro, North Carolina, bar. (R.p. 45)

At the time of the separation, appellant was a board certified anesthesiologist with an M. D. degree. At that time appellee was only a high school graduate. (R.p. 47)

Pursuant to the agreement, appellant made monthly alimony payments to appellee through the end of the year 1975. (R.pp. 38-39) In 1976, appellant stopped making payments to appellee. (R.p. 42)

The district court of Guilford County rejected appellant's contentions that N.C.G.S. §52-6 was unconstitutional. The district court also concluded that because of appellant's degree of education, experience, and sophistication and his excellent legal representation, he would not have benefited in any way from a private examination if one had been made available to him. (R.pp. 50-51)

The North Carolina Court of Appeals held that appellant had not properly raised the question of the constitutionality of N.C.G.S. §52-6 because of a lack of standing, in that (1) if the statute were to have been held unconstitutional, the remedy would be to eliminate the private examination altogether, instead of requiring both males and females to be subjected to it, relief from which appellant would

stand to gain no benefit, and (2) appellant's degree of education, experience, and sophistication, and his excellent legal representation, were such that he could not have suffered any injury in fact from being denied a private examination. (J.S. 9-10-A)

ARGUMENT

Appellee believes that the North Carolina Court of Appeals did not err in refusing to hold N.C.G.S. §52-6 unconstitutional, and in concluding that appellant had no standing to attack the constitutionality of that statute.

I. THE PRIVATE EXAMINATION STATUTE DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF SEX.

If the merits of this case are reached, appellee submits that the case should be controlled by this Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974), instead of the cases cited by appellant. Kahn v. Shevin deals with the validity of an annual $500.00 property tax exemption granted by Florida to widows, but not widowers. The Court in an opinion by Mr. Justice Douglas upheld the statute against the argument that it unconstitutionally discriminated on the basis of sex. The Court took note that the median income of working women was considerably lower than that

of working men. It was concluded that the purpose of the statute to reduce to some extent the disparity between economic capabilities of men and women, was a legitimate one.

The district court judge in the present case, who had served as an assistant clerk of superior court of Guilford County for many years, had conducted numerous private examinations pursuant to N.C.G.S. §52-6. The court took judicial notice that some wives have tended to be unduly influenced by their husbands, and some wives have been accustomed to leaving the financial affairs of the family entirely in the hands of their husbands, so that they are without training or experience in financial matters, and for both of these categories of wives the statutory procedure provides a valuable safeguard for their interests. The court went on to observe that for wives who do not fall in either of these categories, the statutory procedure is not necessary, but at the same time does no harm. The court further expressed the view that instances of husbands being unduly influenced by wives or being deprived of familiarity with the family financial situation was so rare, because of the customs and traditions of our society, that extending the opportunity to husbands for being privately examined would not have any practical beneficial result. (R.p. 51)

The observations and conclusions of the district court in this case make it clear that N.C.G.S. §52-6, as applied, is very much analagous to the Florida statute upheld in Kahn v. Shevin. This statute has simply functioned to ameliorate some of the disadvantages suffered by some wives, those who are either too much under the influence of their husbands, or who have remained ignorant and unsophisticated about the family finances. The statutory procedure provided some benefit to women in this situation. The instances of men being in a similar situation, where they could have benefited by the statute, are so very rare according to our common experience, that a private examination for husbands would be of no practical advantage.

The question presented here is entirely different from the situations before this Court in several cases relied upon by appellant. In these cases the classifications determined to be invalid denied the members of one sex something that was clearly of benefit or advantage to them, such as the servicemen's dependency allowance in Frontiero v. Richardson, 411 U.S. 677 (1973), the social security benefits based on earnings of a deceased spouse in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), or the right to child support

between the ages of 18 and 21, in Stanton v. Stanton, 421 U.S. 7 (1975). The private examination, on the other hand, is not a significant benefit or advantage to husbands, and therefore, N.C.G.S. §52-6 is not unconstitutionally discriminatory.

If N.C.G.S. §52-6 can be perceived as being discriminatory at all, it discriminates against the wife and not against the husband. It is the women, not the men, who have protested against this statute and have brought about its repeal. The women who have sought its repeal regarded the statute as providing an unnecessary, paternalistic protection for wives, which is not consistent with modern conditions. See Legislative Research Commission, Report to the 1977 General Assembly, Sex Discrimination, pp. 100-102. Nowhere, except in appellant's arguments in this case, has it been suggested that the husband is injured by this statute; the obvious remedy in that case would be to make the private examination essential for both husbands and wives, not to repeal it altogether, as the North Carolina General Assembly has done. N. C. 1977 Sess. Laws, Ch. 375.

II. IT WAS PROPERLY HELD THAT APPELLANT IS WITHOUT STANDING TO CHALLENGE THE VALIDITY OF THE STATUTE.

The North Carolina Court of Appeals determined that for two reasons appellant did not have standing to contend that N.C.G.S. §52-6 is unconstitutional. First, the court concluded that if the statute were unconstitutional, the only proper remedy would be to strike the private examination requirement altogether, not to make it equally available to husbands and wives. Appellant has no standing to attack the statute, because he could not derive any benefit from a successful challenge to it. Second, the court found that appellant could demonstrate no injury as a result of the operation of the statute, because he could not have benefited in any way from a private examination if one had been available to him, because of his education, experience, sophistication, and excellent legal representation.

With respect to the first point, the court of appeals said:

> Defendant contends that the right to a privy exam is a valuable right and that we should, therefore, extend that right to him. We disagree. When first enacted, G.S. 52-6 (or, rather, its forerunner)

> conferred a right--the right to enter into a separation agreement. See Archbell v. Archbell, supra. The question is whether the requirement that women have a privy exam prior to entering a separation agreement is a permissible restriction. While in 1915 it was a permissible restriction, the privy exam itself is now and always has been a restriction on the exercise of a right--not a right in itself. This Court has previously held that freedom of contract is a valuable right. See North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General, 17 N.C. App. 701, 195 S.E.2d 356 (1973). We do not believe that infringing upon the freedom of contract enjoyed by married males would be the proper means to remedy the alleged invidious discrimination of G.S. §52-6. The proper remedy, indeed, the only remedy, would be to strike the privy exam requirement from G.S. §52-6. (J. S. 9-A)

As to the second point, the district court concluded that because of appellant's education, experience, and sophistication, and his extremely competent legal representation, he would not have benefited in any way from a private examination if one had been available to him, and further that he did not suffer any disadvantage or detriment on account

of appellee's being privately examined. (R.pp. 51-52) Appellant did not offer any evidence to controvert these conclusions. There were no arguments in appellant's brief in the court of appeals addressed to his exception to these conclusions. Under North Carolina rules of procedure, appellant abandoned the exception, and is not free to take an inconsistent position in this Court. Rule 28(a), North Carolina Rules of Appellate Procedure.

Taking these findings and conclusions as well-founded. it is clear that appellant personally has no standing to challenge the constitutionality of N.C.G.S. §52-6, since he has not been injured by the operation of the statute. It was so held by the North Carolina Court of Appeals.

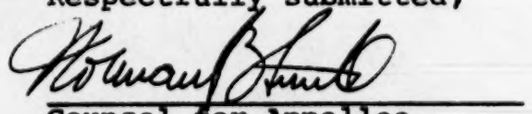
In several recent decisions of this Court involving closely analagous fact situations, litigants were held without standing to present constitutional questions. In Linda R. S. v. Richard D., 410 U.S. 614 (1973), the mother of an illegitimate child averred that state court interpretations of a criminal child support statute, as applying only to fathers of legitimate children, violated the equal protection clause of the Fourteenth Amendment. She sought an injunction requiring the district court to enforce the statute against the father of the child. This Court

held that the mother lacked standing, because she had made no showing that her failure to secure support payments resulted from the non-enforcement of the statute as to her child's father; the prospect that the requested prosecution, in fact, would result in the payment of child support, instead of jailing the father, was only speculative. Also supportive of appellee's position here and the decision of the court below are Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

CONCLUSION

Appellee respectfully submits that the North Carolina Court of Appeals correctly decided that appellant has no standing to challenge the constitutionality of N.C.G.S. §52-6, and further appellee maintains that even if appellant does have standing to attack it, the statute is not inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,



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